U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: California Service Center Date: AUG 21 2000

IN RE: Petitioner: [redacted]
Beneficiary

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The immigrant-based employment visa petition was initially approved by the Director, California Service Center. On the basis of new information received and on further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on February 23, 2000. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner for Examinations, dismissed the petitioner's appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The statutory and regulatory language pertaining to the visa classification sought appear in the previous AAO decision and need not be repeated here. That prior decision also contains a synopsis of the circumstances leading to the revocation of the approval of the petition. Briefly, the director had uncovered information which contradicts fundamental elements of the petitioner's claim of eligibility. For instance, the petitioner had been president of [redacted], and later of [redacted]ch, allegedly, was an [redacted] subsidiary based in the United States. The director's investigation failed to reveal any connection between the two businesses, but the investigation did show that the local government had seized [redacted] and dismissed the petitioner as the company's president. The director revoked the approval of the petition on the grounds that the petitioner had misrepresented material facts, for instance by failing to disclose his dismissal.

In its initial decision, the AAO observed that the Chinese government had charged the petitioner with embezzlement, which "raises a fundamental issue regarding the petitioner's assertion of national acclaim in that country." The initial AAO decision called into question other elements of the petitioner's claim of sustained national or international acclaim.

On motion, counsel reiterates his previous argument that the seizure of [redacted] and hence the petitioner's dismissal, were illegal. The AAO, in its previous decision, has already noted that it is not competent to determine violations of Chinese law. If the petitioner desires to contest the legality of his dismissal, the proper forum is the Chinese courts rather than U.S. immigration authorities.

Counsel contends that the petitioner did not willfully misrepresent material facts by failing to disclose on his 1996 petition that he had been dismissed from his post in 1994. Counsel asserts that [redacted]s board of directors has refused to recognize the petitioner's dismissal, and continues to regard the petitioner as the president of [redacted] Counsel supports this claim with a copy of the minutes of

"the latest . . . Shareholder Meeting and Board of Directors' Meeting . . . and the affidavit of [redacted]" The "latest Shareholder Meeting" was held on February 18, 1992, and the last board of directors meeting was held on June 15, 1993, both before any the seizure of [redacted] in October 1993. The shareholders and board of directors have not since convened to repudiate the seizure of the company or to reaffirm the petitioner's standing as president. [redacted] an [redacted] shareholder and board member, identifies the company's six shareholders and seven members of the board of directors, and asserts that the composition of these groups has not changed since the 1993 board meeting.

Given that corporations only exist under law, it does not appear that the shareholders or board of directors would retain any authority after government seizure of the company. According to court documents in the record, one of [redacted] board members, [redacted] was convicted of embezzlement, tax evasion and related charges, and sentenced to "death with two years of probation" including "labor punishment." It is not at all clear that an individual under a death sentence (albeit a conditional one) has the legal standing to overrule the government's dismissal of the petitioner, or that the condemned individual retains his board position.

A 1993 letter from a U.S. congressman to China's then ambassador to the U.S. indicates that "all the business activities of [redacted] and its joint venture companies have been shut down," indicating that [redacted] was no longer conducting business, regardless of the refusal of the petitioner and the board of directors to acknowledge that fact. Furthermore, as a potential criminal defendant in this matter, the petitioner has a very powerful incentive to deny the legitimacy of the charges against him, and the Chinese government's actions in general in this matter. Various documents in the record reveal repeated false or inconsistent statements by the petitioner which, necessarily, cast grave doubt on his overall credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Evidence cited above demonstrates that the board of directors of [redacted] have not met since 1993, and that the [redacted] government shut down the company that same year. Given that these developments cannot have escaped the petitioner's notice, the petitioner effectively misrepresented this situation when, in his 1996 petition, he represented [redacted] as an active, viable enterprise. Regardless of the petitioner's feelings about the 1993 seizure of [redacted] he did not have effective control over the company in 1996,

and knew (or should have known) that he lacked such control. Counsel's argument that the Harbin government should not have seized the company or dismissed the petitioner does not alter the amply proven fact that they did seize the company and dismiss the petitioner. The record is devoid of persuasive evidence that the petitioner was in any position to act on behalf of [redacted] after his dismissal in early 1994, or that the individual members of the board of directors as it consisted in 1993 were in any position to prevent or countermand that dismissal.

The other issue in contention here is whether the petitioner has earned sustained national or international acclaim. On motion, counsel discusses the petitioner's establishment of [redacted] which has no relationship to [redacted] and the petitioner submits several documents relating [redacted]

The initial submission accompanying the Form I-140 petition, filed in 1996, makes absolutely no mention of [redacted] The petitioner likewise never mentioned [redacted], in response to the notice of intent to revoke or on appeal from that revocation. Only now, on motion, does the petitioner claim eligibility for benefits arising from his involvement with [redacted]

8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

For comparison purposes, when used in the context of other legal disciplines, the phrase "new facts" or "new evidence" has been determined to be evidence that was previously unavailable and could not have been discovered during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, the regulations at 8 C.F.R. 3.2 state:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. . . . A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and *was not available and could not have been discovered or presented at the former hearing* . . . ." (emphasis added.)

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992); INS v. Abudu, 485 U.S. 94, 100 (1988); see also Matter of Coelho, 20 I&N Dec. 464, 472 n.4 (BIA 1992). Accordingly, in federal criminal proceedings, a motion for a new trial based on newly discovered evidence "'may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . *they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier*, and . . . they are not merely cumulative or impeaching.'" Matter of Coelho, 20 I&N Dec. at 472 n.4 (quoting Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988)) (emphasis added).

In this case, the petitioner has not provided "new" evidence, but rather he has submitted old evidence which he simply chose to withhold until the present motion. Because the petitioner had never before referenced Universal Power, Inc., the director did not err in failing to consider the petitioner's work with that company. If the petitioner now, at this late date, wishes to claim eligibility based on his work with a corporation he had never previously mentioned, the proper avenue is to file a new petition accompanied by the appropriate evidence. Jurisdiction pertaining to initial determinations of eligibility lies not with the AAO but with the center director, and the petitioner cannot circumvent this jurisdiction by simply withholding a claim until the appellate stage. The AAO need not now, on motion, consider this claim in detail because it has nothing to do with the evidence which the director had considered in revoking the approval of the petition, and therefore it cannot show that the director acted improperly in revoking that approval.

The record supports the director's determination that the initial finding of eligibility rested on misrepresentations by the petitioner, and that the record contains no consistent, credible evidence that the petitioner is eligible for the highly restrictive visa classification sought. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of July 3, 2000 is affirmed. The petition is denied.